

WAHLA (Migration) [2018] AATA 4965 (12 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr AKASHDEEP SINGH WAHLA
CASE NUMBER:	1714294
DIBP REFERENCE(S):	BCC2015/3432402
MEMBER:	Russell Matheson
DATE:	12 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 12 October 2018 at 10:38am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – spouse of sponsor – marriage certificate – inconsistent information – wedding ring description – temple visits – limited transactions in joint account – amount of savings in joint account – changed mailing address – photographs from Departmental interview – statutory declaration from friends – purchased individual wedding rings – not wearing rings to hearing – decision under review affirmed

LEGISLATION

*Migration Act 1958 (Cth), ss 5F, 65, 359AA
Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 820.211, 820.221*

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 20 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a 29 year old male national of India. He applied for the visa on 20 November 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied he was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 4 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
7. The Tribunal has before it the Department of Immigration's (the Department) file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
8. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.
9. **Hearing**
10. s.359AA
11. The Tribunal is mindful that the applicant and sponsor were inconsistent with their evidence during the hearing on a number of occasions and this led the Tribunal to question the applicant and sponsor's credibility. These inconsistencies were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal informed the applicant that it wished to put new information that it would consider being the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information to the applicant and invited the applicant to comment on or to respond to the information. The Tribunal told the applicant that he may respond to the information orally or in writing. The applicant was also informed that he may seek additional time to comment on or respond to the information. The applicant responded orally at the hearing.

12.

13. The applicant provided evidence to the Tribunal that he had purchased a wedding ring in the company of the sponsor at West Point shopping centre Blacktown. He further stated that the wedding ring was gold coloured and had two clear stones that were not diamonds. The sponsor told the Tribunal that she did not go with the applicant and was not in his company when he purchased the wedding ring and the wedding ring was purchased from Michael Hill jewellers. She further stated that the ring was gold coloured and has a single diamond. The Tribunal put the inconsistencies in evidence in relation to the description and purchase of the ring to the applicant in accordance with s.359AA:
14. The applicant stated that the parties did go together to purchase the ring and the sponsor was confused because they had visited many shops looking at rings. He further stated that the parties described the ring differently because they do not see the ring very often because they both work.
15. The Tribunal does not accept the applicant's evidence as credible; that the sponsor was confused and could not remember being in his company on such a significant occasion such as purchasing the wedding ring or they gave different descriptions because they do not see the ring very often.
16. The applicant provided evidence to the Tribunal that he attends his local temple which is two streets away from his house in the company of the sponsor and it is a 5-10 minute walk to the temple. The sponsor in evidence told the Tribunal that she does not attend the temple very often and she cannot remember the suburb the temple is located but it is a 20 minute drive in a car. The Tribunal put the inconsistencies in evidence in relation to the travelling to and location of the temple to the applicant in accordance with s.359AA.
17. The applicant responded that when you travel by car you have to travel via Sunnyholt Road which is a busy road and if you go all around it will take you 15 minutes to get to the temple.
18. The Tribunal accepts that it may take longer to travel by car but the applicant failed to address the sponsor's limited knowledge of where the temple was actually located. Based on the evidence provided the Tribunal finds there is little evidence to support that the parties attend the temple in each other's company.
19. The Tribunal queried the parties in relation to the social aspects of their relationship and asked them when they last dined out together. The applicant told the Tribunal that they had dined out two weeks ago and the sponsor said last weekend. The Tribunal put the inconsistencies in evidence in relation to the last time the couple dined out together to the applicant in accordance with s.359AA:
20. The applicant told the Tribunal that the sponsor was confused and she was too busy working and could not remember the actual day they dined out together, she only remembers the date roughly.
21. The Tribunal does not find the applicant's evidence credible in relation to the sponsor's memory when the sponsor is referring to a date a few days before the Tribunal hearing. The parties did not produce any corroborative evidence of dining out together and the Tribunal is of the view the parties have fabricated their evidence to strengthen their case for the grant of the visa.
- 22.
- 23.

Whether the parties are in a spouse or de facto relationship

24. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
25. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

26. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered in the state of New South Wales under the *Births Deaths and Marriages Registration Act 1995*. The marriage certificate indicates that the parties were married on 13 October 2015 at Drummoyne. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

27. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
28. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
29. The Tribunal had the benefit of the applicant's and sponsors oral evidence at the hearing and found their evidence overall lacked detail, was inconsistent and not credible. The Tribunal gave all the evidence provided by the parties and witness' at the Tribunal hearing and evidence provided to the Department in the primary application and Tribunal file due regard.

30. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is not satisfied that the parties are credible witnesses.

31. Financial aspects

32. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of day-to-day household expenses.
33. The parties provided the following evidence regarding the financial aspects of their relationship:
- Letters from ANZ bank showing two joint bank accounts opened 16 October 2015.
 - Letter from Westpac showing joint bank account opened 12 December 2016.
 - Joint car insurance.
 - Joint Westpac bank statement for the period 31 October 2017-30 November 2017.
 - Joint Westpac bank statement for the period 30 November 2017-29 December 2017.
 - Joint Westpac bank statement for the period 29 December 2017-31 January 2018.
34. The parties have provided documents showing three joint bank accounts to the Department which were opened on 16 October 2015 and 12 December 2016. No bank statements have been provided or evidence that these bank accounts are used by both the applicant and sponsor. The parties also provided three Westpac bank statements for the period from 31 October 2017 to 31 January 2018. Generally the statements show money being transferred from the applicant's personal account into the joint account and immediately being withdrawn for rental payments. There are very few transactions from the joint account to indicate that the account is utilised for day-to-day living expenses or payment of any other bills such as utility bills. The Tribunal accepts that the parties have a joint account in both names and that there are some transactions for daily living expenses. There is no evidence that the sponsor makes a contribution to the joint account for day-to-day living expenses. There is no evidence of any sharing or pooling of financial resources between the parties. The applicant and sponsor stated that they have their own personal accounts that their wages are deposited into. Based on the evidence provided the Tribunal finds the parties do not share or pool their financial resources. The Tribunal places little weight on the evidence provided.
35. The sponsor told the Tribunal that the parties have fifty thousand dollars in savings in their joint account. The Tribunal indicated to the sponsor that bank statements presented as evidence of their joint account indicated that there was no money in the account. The sponsor said that she was surprised there was no money in the joint account. The applicant told the Tribunal there was no money in the joint account because he sends money to his family in India and his parents will return it to him anytime he makes a request for it. The applicant told the Tribunal that he did not share this information with the sponsor. The sponsor said that she was not aware that the applicant was sending money to his parents in India but understands why. Based on the evidence provided the Tribunal finds that the parties do not share a common financial plan for their future and are secretive with each other in regards to their financial arrangements and resources.

36. The parties also provided joint compulsory third party personal injury insurance for the applicants' motor vehicle and gas account in joint names. The Tribunal places little weight on the document showing the parties combining their insurance given that the Tribunal has found that the parties do not share a common financial plan for their future.
37. There is no evidence before the Tribunal that the parties have any joint ownership of real estate, major assets, joint liabilities or any one person in the relationship owes any legal obligation in respect of the other. The applicant has provided limited information regarding the financial aspects of the parties' relationship in relation to the pooling and sharing financial resources or sharing daily living expenses. Based on the evidence provided the Tribunal finds that the financial aspects of the relationship are not indicative of the parties being in a genuine spousal relationship.

38. Nature of the household

39. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements and daily routine of the parties and the sharing of the responsibility for housework.
40. The parties provided the following evidence regarding the nature of their household:
- Joint tenancy agreement starting on 2 May 2017 signed by the parties on 25 April 2017.
 - Statutory declaration from the applicant's friend and flatmate/landlord dated 27 October 2015.
 - Mail addressed to the applicant and sponsor from India addressed to [Address 1] with no identifiable dates.
 - Energy Australia gas bill in joint names for the period June 2017 to January 2018.
 - Joint compulsory third party personal injury insurance for the applicants' motor vehicle dated 7 December 2017.
 - AEC document addressed to the sponsor at [Address 1] dated 14 June 2017 with an enrolment date of 4 June 2017 for that address.
 - RMS document addressed to the sponsor at [Address 1] dated 18 September 2017.
 - The sponsor produced her driver's licence at the hearing which indicated that she had changed her address from [Address 1] to [Address 2].
41. The applicant previously provided a statutory declaration to the Department from friends the applicant claimed to live with at [Address 1]; the statutory declaration from his friends Varandeep Singh and Alifia Shabbir states that the applicant and sponsor have been living together at that address from October 2015. In the absence of other convincing documentary evidence, the Tribunal gives the declaration little weight as evidence that the parties shared a household and the responsibilities of a household as spouses prior to signing the tenancy agreement starting on 2 May 2017. The parties' evidence is that they have been living at [Address 1] since October 2015 with the applicant's friends and signed a joint tenancy agreement when the applicant's friends moved to another address. The Tribunal accepts that the parties have provided documentary evidence addressed to them at [Address 1] from May 2017. The Tribunal places little weight upon the documents as evidence that the parties have been living at [Address 1] from October 2015. The parties

provided no documentary evidence related to the household addressed to them individually or jointly prior to May 2017.

42. The sponsor when queried as to why she had changed her address on her licence to her mother's address in [Address 2] stated that she changed her address 12 months ago. She further stated she buys jewellery items on line and has them sent to the [mother's] address. The sponsor also said that she purchases presents such as rings and watches for the applicant as presents and does not want him to see them. The applicant stated that the sponsor had changed her address because letters went missing and there are certain things she wants to go there such as any type of present. The sponsor did not provide any evidence of purchasing such items on line and the Tribunal found the parties vague and inconsistent and their evidence lacked detail in relation to the sponsor changing her address. While there is limited evidence that the parties may now live together at [Address 1], the Tribunal based on the evidence provided by the parties, finds that the applicant and sponsor have not lived together prior to May 2017 and is not satisfied that they now live together in a joint household as spouses.
43. The parties provided evidence that they share the household duties and responsibilities such as cooking, cleaning and grocery shopping. They further stated that they had purchased household items together such as a fridge, television and lounge. The parties did not provide any documentary evidence of purchasing household items or purchasing groceries together. There is limited evidence of the parties sharing the household duties and responsibilities and the Tribunal places little weight on the evidence provided.
44. Overall, based on the evidence provided by the parties, the Tribunal finds that the parties have not established a joint household together or that the parties share the household duties or responsibilities for housework. There are no children of the relationship. The Tribunal places little weight on this aspect of the relationship based on the evidence presented at the hearing.

45. Social aspects

46. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
47. The parties have provided photographic evidence with the visa application to the Department of photos taken of themselves with each other and with friends. The Tribunal notes that a majority of the photos are of the applicant and sponsor in each other's company. The Tribunal accepts that the parties have undertaken some joint social activities and have met each other's friends. The parties provided one additional Snapchat photograph talking to each other on their mobile phones to the Tribunal. The Tribunal queried both the applicant and sponsor as to whether they had any other photographic evidence of their social activities together post the visa application. Both the applicant and sponsor told the Tribunal that they had purchased new mobile phones a few months ago and did not have any new photos on their new phones. The Tribunal places no weight on the Snapchat photo and little weight on the previous photographs provided as convincing evidence of the parties being in a committed spousal relationship.
48. The parties stated that they have not attended any significant events such as weddings or birthday parties together. They further stated that they dine out at an Italian restaurant at Castle Hill and Indian restaurant at Harris Park every now and then. The applicant said that he attends his local Indian temple in the company of the sponsor. The sponsor told the Tribunal that she does not attend the temple very often with the applicant.

49. The parties also provided form 888 statutory declarations from friends with the visa application. Both documents confirm that they have met the parties. However, both statements indicate that they have known the sponsor for a relatively short period of time, and do not give any convincing reasons as to why they believe the relationship is genuine and continuing or any insight into the inception or development of the relationship; therefore the Tribunal gives them little weight.
50. The parties stated that their families support their relationship at the present time although there was a cultural difficulty with the sponsor's family accepting the applicant into the family. The parties did not provide any corroborative evidence of family support such as statutory declarations or statements. The Tribunal places little weight on the evidence of family support.
51. The Tribunal queried the applicant and sponsor as to whether they had purchased wedding rings for each other. The parties responded that they had purchased individual wedding rings. The Tribunal queried the parties as to why they were not wearing their wedding rings. The applicant said he was a truck driver and worked with concrete and that he had left it in his truck. The sponsor told the Tribunal that she works in the hospitality industry and does not wear it at work and that she had forgotten to put it on in the morning before coming to the hearing. Based on the evidence provided by the parties the Tribunal finds that there is little evidence that the parties present themselves to the wider community as being in a marital relationship.
52. Overall, there is not convincing evidence that the parties present themselves as a married couple to family or the wider community, that they undertake regular joint social activities, or have taken holidays or short breaks together, or that they have attended any significant events together or that they belong to any organisations or groups.
53. Based on the evidence provided the Tribunal finds that the applicant and sponsor do not present themselves to family and friends as being in a committed spousal relationship, or are regarded by others as such. The Tribunal is not satisfied the social aspects of the relationship indicate that the parties are in a genuine and continuing relationship. The Tribunal places little weight on this aspect of the relationship.
54. **Commitment**
55. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
56. The parties claim to have known each other since 18 September 2015 and were married on 13 October 2015. The Tribunal accepts that the parties are lawfully married as they have provided a marriage certificate. The parties claim to have been in a committed relationship for a period of nearly three years.
57. The applicant provided signed statement outlining how they first met and how the relationship developed. The Tribunal has concerns as to the short period (one month) from the inception of the relationship to marriage as to the genuineness of the relationship.
58. The parties stated that they wanted to start a family and save to purchase their own home and travel to India. The parties provided little evidence of future financial planning or family planning to achieve their goals. The applicant told the Tribunal that he has made the sponsor the beneficiary of his superannuation scheme.

59. The parties both indicate that they see their relationship as a long-term one, however the accompanying evidence and oral evidence provided at the Tribunal hearing by the parties in relation to the nature of the household, financial, social, and commitment aspects of their relationship does not support this notion. The parties have not provided any evidence of mutual obligation, companionship, emotional support and long-term planning which are typical components of a marital relationship.
60. Whilst the Tribunal is satisfied the applicant and sponsor are legally married, there is insufficient evidence before the Tribunal that the parties see their relationship as a long-term one, that they draw emotional support and companionship from each other or that they have a commitment to a shared life together.

61. Findings

62. Based on the evidence provided by the parties the Tribunal finds that the parties do not pool or share their financial resources or share the daily expenses or that they have planned a financial future together. The Tribunal finds that there is no evidence of any joint ownership of real estate or other major assets or any joint liabilities or that one person in the relationship owes any legal obligation in respect of the other.
63. Based on the evidence provided there is limited evidence to show the parties established a joint household or shared the household responsibilities together. Based on the evidence provided by the parties, the Tribunal finds that the parties do not live together as spouses and share the responsibility for housework. The Tribunal accepts that the parties have provided some evidence in individual and joint names for their current address from May 2017.
64. Based on the evidence provided by the parties the weight of the evidence does not support that the parties represent themselves to the wider community as being married to each other and that friends and acquaintances have a sound knowledge of the nature of the relationship. There is very little evidence before the Tribunal to indicate the relationship is socially recognised by family members, acquaintances or friends of the applicant or sponsor. There is little evidence that supports that the parties represent themselves to other people as being in a spousal relationship outside a select group of people. The Tribunal accepts on the evidence provided to the Tribunal that the parties have undertaken some social activities together.
65. Based on the evidence provided the Tribunal does not accept that the parties have been in a long-term relationship since October 2015. The Tribunal accepts that the parties have been legally married for nearly three years. Based on the evidence provided by the parties at the hearing, the Tribunal finds the evidence does not support that the parties live together as spouses or that they draw a degree of companionship or emotional support from each other that is indicative of being in a genuine spousal relationship or that they view their relationship as a long-term one.
66. Overall, having considered all the circumstances of the relationship, the Tribunal finds that the weight of evidence does not support a finding that the parties are in a genuine and continuing relationship. The Tribunal does not consider the financial, household, social or commitment aspects of the parties' relationship as being indicative of a couple with a genuine and mutual commitment to a shared life together.
67. Taking the above into account and considering all of the evidence cumulatively and holistically, the Tribunal is not satisfied the applicant and the sponsor have established that they are in a genuine and continuing relationship or have a mutual commitment to a shared

life together to the exclusion of all others or that they are not living separately and apart on a permanent basis.

68. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2)(b)-(d) are met at the time the visa application was made and the time of this decision. There is no information before the Tribunal that the applicant would satisfy any of the alternate criteria for the grant of the visa.
69. Given these findings the Tribunal is not satisfied that at the time the visa application was made or the time of this decision the parties were in a spousal relationship. Therefore, the applicant does not meet cl.820.211(2)(a) and cl.820.221.

DECISION

70. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

